Supreme Court, U.S.
FILED
MAR 22 2011
OFFICE OF THE CLERK

No. 10-1164

In The

Supreme Court of the United States

RYAN D. HEATH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

KENT A. SIMMONS
Attorney at Law
601 Brady Street, Suite 311
Davenport, Iowa 52803
(563) 322-7784
(563) 323-9309 facsimile
ttswlaw@bigplanet.com

Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

WHETHER DENIAL OF AN AFFIRMATIVE DEFENSE OF REASONABLE MISTAKE OF FACT ON A CHARGE UNDER 18 U.S.C. 2251(a) IGNORES THE PRESUMPTION OF SCIENTER AND THEREBY CREATES A QUESTION AS TO VIOLATION OF THE FIRST AMENDMENT OF THE FEDERAL CONSTITUTION.

PARTIES TO THE PROCEEDING

Petitioner (Defendant and Appellant below):

RYAN D. HEATH

Represented by Kent A. Simmons
Attorney at Law
601 Brady Street, Suite 311
Davenport, Iowa 52803

Respondent (Plaintiff and Appellee below):

THE UNITED STATES OF AMERICA

Represented by the Solicitor General

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
CITATIONS FOR OPINIONS BELOW	1
BASIS FOR JURISDICTION IN THIS COURT	1
CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING CERTIORARI	5
DENIAL OF AN AFFIRMATIVE DEFENSE OF REASONABLE MISTAKE OF FACT ON A CHARGE UNDER 18 U.S.C. 2251(a) IGNORES THE PRESUMPTION OF SCIENTER AND THEREBY CREATES A QUESTION AS TO A VIOLATION OF THE FIRST AMENDMENT OF THE FEDERAL CONSTITUTION AND THE CONVICTION MUST BE REVERSED	10
CONCLUSION	31

CONTENTS OF APPENDIX:

Eighth Circuit Decision	App. 1
District Court Ruling	App. 10
Order Denying Rehearing En Banc	App. 21

TABLE OF AUTHORITIES

Page

CASES

F.C.C. v. Pacifica Foundation, 438 U.S. 726, 98 S. Ct. 3026 (1978) 26

Gilmour v. Rogerson, 117 F.3d 368 (8th Cir. 1997) ..... *passim*

Morissette v. U.S., 342 U.S. 246, 72 S. Ct. 240 (1952) 23

New York v. Ferber, 458 U.S. 747, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982) ..... *passim*

Smith v. California, 361 U.S. 147, 80 S. Ct. 215 (1959) 13, 14

Staples v. U.S., 511 U.S. 600, 114 S. Ct. 1793 (1994) 7, 23

United States v. United States Gypsum Co., 438 U.S. 422, 98 S. Ct. 2864 (1978) 6

United States v. X-Citement Video, Inc., 513 U.S. 64, 115 S. Ct. 464 (1994) ..... *passim*

U.S. v. Crow, 164 F.3d 229 (5th Cir. 1999) 29, 30

U.S. v. Deverso, 518 F.3d 1250 (11th Cir. 2008) 6, 29

U.S. v. Griffith, 284 F.3d 338 (2nd Cir. 2002) 30

U.S. v. Humphrey, 608 F.3d 955 (6th Cir. 2010) 6, 30, 31

U.S. v. Johnson, 376 F.3d 68 (7th Cir. 2004) 31

U.S. v. Malloy, 568 F.3d 166 (4th Cir. 2009) 6, 29

U.S. v. Stevens, 130 S. Ct. 1577 (2010) 27

TABLE OF AUTHORITIES – Continued

Page

U.S. v. U.S. District Court for the Central District of California, 858 F.2d 534 (9th Cir. 1988) ..... *passim*

U.S. v. Wilson, 565 F.3d 1059 (8th Cir. 2009) 6, 27, 28, 30

Young v. American Mini Theaters, Inc., 427 U.S. 50, 96 S. Ct. 2440, 2448 L. Ed. 2d 310 (1976) 24, 25, 26

CONSTITUTIONAL PROVISIONS AND STATUTES

Constitution of the United States Amendment I ..... *passim*

United States Code 18 U.S.C. 2251(a) ..... *passim*

United States Code 18 U.S.C. 2251(e) 1, 2, 11

PETITION FOR WRIT OF CERTIORARI

Petitioner Ryan D. Heath respectfully prays this court issue a Writ of Certiorari in order to address the important constitutional issue raised herein and to promote the fair administration of justice.

CITATIONS FOR OPINIONS BELOW

The judgment of the United States Court of Appeals now challenged appears in the Appendix [App.], beginning at page 1. It is published at *U.S. v. Heath*, 624 F.3d 884 (8th Cir. 2010). The Order at issue herein that denied an affirmative defense was not published. It was filed in the Northern District of Iowa on May 1, 2009, and it is attached hereto in the Appendix beginning at page 8.

BASIS FOR JURISDICTION IN THIS COURT

This Petition arises from a direct appeal that granted final and full judgment against Petitioner. The action is on a criminal prosecution the Government initiated under 18 U.S.C. 2251(a) and (e) in the Northern District of Iowa Petitioner entered a conditional plea of guilty to one count of producing child pornography. The district court imposed a sentence of 293 months imprisonment. App. 1

The Eighth Circuit affirmed in an opinion filed November 16, 2010. (App. 1) A petition for rehearing

was denied by a ruling filed December 22, 2010. (App. 21) Jurisdiction in this court is under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

Constitution of the United States:

Amendment I

> Congress shall make no law. . . . abridging the freedom of speech. . . .

United States Code:

> 18 U.S.C. 2251(a) and (e):
>
> (a) Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct, shall be punished as provided under subsection (e), if such person knows or has reason to know that such visual depiction will be transported in interstate or foreign commerce or mailed, if that visual depiction was produced using materials that have been mailed, shipped or transported in interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported in interstate or foreign commerce or mailed.

* * *

(e) Any individual who violates, or attempts or conspires to violate, this section shall be fined under this title and imprisoned not less than 15 years nor more than 30 years. . . .

STATEMENT OF THE CASE

An indictment in two counts was filed against Mr. Heath on January 28, 2009. In Count One, the charge was Exploitation of a Minor in violation of 18 U.S.C. 2251(a). The Government charged Mr. Heath for the production of a video depicting two young women under the age of 18, engaging in sexually explicit conduct. The second count was for possession of the same video. Mr. Heath filed a motion for a determination of whether he was entitled to assert a defense at trial for a reasonable mistake as to the ages of the young women. While that motion was pending, the Defendant entered a conditional guilty plea to Count One, and by plea agreement the second count was dismissed. Judge Linda R. Reade denied the motion for the affirmative defense on May 1, 2009, and on January 28, 2010, Mr. Heath was sentenced on Count One to 293 months imprisonment, the sentence recommended at the top of the Sentencing Guidelines range the judge had calculated. The Order rejecting the affirmative defense is attached in the Appendix at pages 10 to 20. Mr. Heath appealed the denial of the defense to the Eighth Circuit Court of Appeals. The panel that decided his case believed it

was constrained to follow prior panel rulings in the circuit that will be discussed below. Relief was denied. (App. 3-4)

On the evening of April 21, 2007, three young women from a small town just west of Cedar Falls, Iowa, set out on a car ride with a bottle of vodka. The three were B.B., age fourteen, C.E., age fifteen and K.F., age seventeen. The bottle of vodka was a brand named "U.V.", and they had selected the blue raspberry flavor. The girls consumed three quarters of the bottle in the first part of the evening. The information regarding the bottle of vodka was later provided to police by the fifteen-year-old C.E. (PSIR, ¶ 15, 17) (Doc 7)

Eventually, the three young women met up with some other friends and followed them to Mr. Heath's home in Cedar Falls where some people were socializing around a bonfire. Mr. Heath did not know B.B., C.E. or K.F. He took steps to find out how old they were. Ryan Heath had a friend at the party whose first name was also Ryan. This was Ryan Miller. Mr. Miller heard K.F. tell Ryan Heath that she was 19 and her friend, C.E., was 18 years of age. (Doc 26, p. 8) The two young women then had more alcohol to drink as they socialized around the bonfire. Eventually, the two young women began to kiss and caress each other right at the fire in front of everyone else. Breasts were exposed. A man named Jeremiah Aneweer recorded this activity with a video camera in his cell phone. He later provided a clip of this scene to police. It shows one of the young women repeatedly

kissing the breast of the other. A voice can be heard on the video saying. "I've got $100 for each of you to make a private video." The women agreed, and they went into Mr. Heath's house. C.E. and K.F. agreed to begin that video by having oral sex with each other. That evolved into sex acts the two engaged with Mr. Heath and Mr. Miller. Meanwhile, Aneweer was surreptitiously able to take some cell phone video of this activity in the bedroom as he stood outside on a balcony and aimed the phone through a window. The camera being used in the bedroom did appear to be operating, but after K.F. became ill and wanted to stop, someone announced that video had been destroyed. No video was ever found from that camera. The clips from Aneweer's phone were the only video scenes recovered. (PSIR, pp. 5-9)

REASONS FOR GRANTING CERTIORARI

Mr. Heath relied on *U.S. v. U.S. District Court for the Central District of California*, 858 F.2d 534 (9th Cir. 1988) in both the district and appellate courts in arguing for the benefit of an affirmative defense to present in a jury trial. The *District Court* opinion was a split decision from a three-judge panel in the Ninth Circuit that said 18 U.S.C. 2251(a) would violate the First Amendment unless an accused producer of child pornography could assert an affirmative defense of mistake-of-fact. Mr. Heath claimed he should have had the opportunity to prove to a jury that he reasonably believed C.E. and K.F. were not minors because

of their appearance, the fact they lied about their age, and their conduct that led to the filming.

Several circuits have rejected the analysis of *District Court*. In a recent decision, a Sixth Circuit panel pointed out that the Ninth Circuit "stands alone" in its adherence to the *District Court* decision that requires an affirmative defense to Section 2251(a). *U.S. v. Humphrey*, 608 F.3d 955, 957 (6th Cir. 2010). The *Humphrey* case decided the Ninth Circuit should continue to stand alone. In addition to the Sixth and Eighth Circuits, the *District Court* holding has been specifically rejected by others. See: *U.S. v. Wilson*, 565 F.3d 1059, 1067-1069 (8th Cir. 2009); *U.S. v. Malloy*, 568 F.3d 166, 173 (4th Cir. 2009) and *U.S. v. Deverso*, 518 F.3d 1250, 1258 (11th Cir. 2008). Petitioner Heath will demonstrate that this circuit split should be corrected and that this Court must rule the decisions rejecting *District Court* suffer from defective constitutional and statutory analysis. As a major component of the chilling effect on the First Amendment, the denial of the affirmative defense leaves the statute imposing strict criminal liability. The common law presumption that a criminal act requires *mens rea* cannot be overcome simply because a criminal statute omits that element. *United States v. United States Gypsum Co.*, 438 U.S. 422, 438, 98 S. Ct. 2864, 2874 (1978), this court said:

> Certainly far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement.

Most importantly, harsh penalties of imprisonment must be "a significant consideration in determining whether the statute should be construed as dispensing with *mens rea*." *Staples v. U.S.*, 511 U.S. 600, 616, 114 S. Ct. 1793, 1802 (1994). (emphasis supplied)

With penalties for a first-time offender in a mandatory range of imprisonment from a minimum of fifteen years to a maximum of thirty years, the penalty for production of child pornography under Section 2251 must be considered harsh.

After the *District Court* decision, this Court decided a statutory interpretation question in *U.S. v. X-Citement Video, Inc.*, 513 U.S. 64, 115 S. Ct. 464 (1994). That opinion addressed the wording of 18 U.S.C. 2252(a). The statute does not address "production" of a visual image of a minor, as Section 2251(a) does. Rather, Section 2252 prohibits "knowingly" transporting, shipping, receiving, distributing, or reproducing a visual image involving "the use of a minor in sexually explicit conduct." The issue in *X-Citement Video* was whether the adverb "knowingly" that is set out in 2252 qualifies only the several verbs that follow it or whether it also requires a knowledge that a person in the prohibited visual image is a minor.

The *X-Citement Video* decision engaged in traditional statutory interpretation to reach the conclusion that "knowingly" qualified the phrase "involves the use of a minor." The use of "knowingly" in the statute

led to the conclusion that proof the defendant knew the person depicted was a minor would be an element of the crime. The Government had urged a strict grammatical reading of the statute to apply "knowingly" only to the verbs involved in transmission and receipt of the images, and not the "use of a minor." The Court first rejected the strict interpretation on the basis it would lead to absurd results. 513 U.S. at 69, 115 S. Ct. at 467-468. The Court then stated its reluctance to accept the Government's interpretation "is heightened by our cases interpreting criminal statutes to include broadly applicable scienter requirements, even where the statute by its terms does not require them." 513 U.S. at 70-73, 115 S. Ct. 468-469. The Court then engaged in an extensive review of legislative history to find there was no support in that area for the Government's interpretation. 513 U.S. at 73-78, 115 S. Ct. at 470-472. It was only fourth and finally that the *X-Citement Video* court stated the Government's interpretation of 2252 would violate "a final canon of statutory construction." This Court pointed out three of its previous decisions that cautioned:

> [A] statute completely bereft of a scienter requirement as to the age of the performers would raise serious constitutional doubts. It is therefore incumbent upon us to read the statute to eliminate those doubts so long as a reading is not plainly contrary to the intent of Congress. 513 U.S. at 78, 115 S. Ct. 472.

The *X-Citement Video* decision reversed a Ninth Circuit opinion on the basis of statutory construction. The decision specifically pointed out that scienter must be presumed to be intended by Congress, and a construction that creates serious constitutional doubts must be "eliminated." 513 U.S. at 78, 115 S. Ct. at 472. This method of interpretation is exactly the one the judges in *District Court* employed and the circuits that rejected *District Court* have ignored.

Ironically, the Ninth Circuit panel in *X-Citement Video* had agreed with the Government's strict grammatical interpretation applying "knowingly" only to the verbs relating to transport and receipt. As a result, however, the panel found lack of a knowledge element on the age of the subject rendered the statute unconstitutional, as it chilled protected speech. *U.S. v. X-Citement Video*, 982 F.2d 1285, 1290-1291 (9th Cir. 1991). This Court's reversal of the Ninth Circuit in *X-Citement Video* actually supports the analysis the Ninth Circuit used in *District Court* and supports the analysis Petitioner Heath advances herein. The several circuits Petitioner noted above have misunderstood *X-Citement Video* and violated its rules for statutory interpretation.

DENIAL OF AN AFFIRMATIVE DEFENSE OF REASONABLE MISTAKE OF FACT ON A CHARGE UNDER 18 U.S.C. 2251(a) IGNORES THE PRESUMPTION OF SCIENTER AND THEREBY CREATES A QUESTION AS TO A VIOLATION OF THE FIRST AMENDMENT OF THE FEDERAL CONSTITUTION AND THE CONVICTION MUST BE REVERSED.

The polestar, exhaustive study on this issue is still *U.S. v. U.S. District Court for the Central District of California*, 858 F.2d 534 (9th Cir. 1988). Part of 18 U.S.C. 2251(a) changed between the time of the offense in that case in the 1980's and the time of instant events in question in April of 2007. The portion of the statute relevant to the instant question remains unchanged, however:

> Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, . . . any sexually explicit conduct for the purpose of producing any visual depiction of such conduct, shall be punished as provided under subsection (d), if such person knows or has reason to know that such visual depiction will be transported in interstate or foreign commerce or mailed, or if such visual depiction has actually been transported in interstate or foreign commerce or mailed. (Statute as quoted at 858 F.2d at 537). (See 18 U.S.C. 2251(a) of 2007 Code).

The 2007 version of this same statute includes all of the language above, except punishment is now provided in subsection (e) rather than (d).

The constitutional question eventually arises because, unlike Section 2252, the statutory description of the prohibited conduct does not include any reference to the knowledge the offender would have as to the minority of the person depicted in any sexually explicit conduct. Does the statute imply scienter, or is it a strict liability offense? Does a criminal conviction require an *element* of scienter in regard to the age of the subject? If not, is a defendant entitled to an affirmative defense in mistake of fact as to the minority of the subject?

The Ninth Circuit panel in *District Court* first addressed the question of whether the statute could be construed to require scienter as an element the Government would have to prove. The more specific question would be whether Congress deliberately omitted the adverb "knowingly" from Section 2251(a) in defining the prohibited acts. The panel found the omission was "quite clearly deliberate." Both the House and the Senate considered drafts "making it unlawful for any person 'knowingly' to employ, entice or coerce a minor to engage in sexually explicit conduct for the purpose of producing or promoting a film or other print or visual medium." The Court pointed out that while both Houses were considering bills with "knowingly" included, the Department of Justice (DOJ) "urged deletion" of "knowingly" from the language. Specifically, the DOJ explained the word

should be omitted to relieve the Government from having to prove a defendant "knew" the subject was a minor. Both Houses then struck "knowingly" from the bills and the statute was enacted without the element. The three-judge panel unanimously concluded the language and legislative history would prohibit a construction making "knowledge of the minor's age" an element of the offense. 858 F.2d at 538.

The panel split on the question of whether statutory construction and the First Amendment of the Constitution of the United States guaranteed a reasonable mistake of fact as an affirmative defense on the element of the subject's age. The filmmakers conceded the affirmative defense was not afforded on the face of the statute, but claimed the statute must implicitly provide the defense in order to save it from constitutional infirmity. Just because the DOJ persuaded Congress to delete an element of scienter, that does not mean statutory construction or the Constitution will allow a strict liability. The two-judge majority in *District Court* examined a wealth of United States Supreme Court case law in concluding "we must be careful to ensure that in regulating unprotected speech, Congress does not also chill speech that is protected." 858 F.2d at 538.

The film at issue in *District Court* was titled *Those Young Girls*, produced in 1984. It featured 16-year-old Traci Lords, appearing in sexually explicit conduct. The defense claimed Lords and her agent defrauded them into believing she was not an underage actress. The age of majority is set at 18 years, as

defined by Section 2256(1). The defendant filmmakers did not come into court to dispute Ms. Lords's actual age or the Government's authority to regulate the use of minors in sexually explicit films. The defense maintained they had a right to avoid conviction with evidence of a good-faith mistake as to Lords's age. The Government claimed that because knowledge of age was not an element, a mistake could not be a defense. 858 F.2d at 536.

The panel disagreed and began its constitutional analysis by explaining that the Government was not claiming *Those Young Girls* was obscene. That meant the film would enjoy the full protection of the First Amendment "were it not for its depiction of a minor." From that, the Court was able to distill the question to the constitutional protection a defendant may lose if the unfettered operation of a statute would serve to chill the protected right of free expression:

> The age of the subject thus defines the boundary between speech that is constitutionally protected and speech that is not. The question we must resolve is whether Congress may subject a defendant to strict liability for misjudging the precise location of that boundary. 858 F.2d at 538-539.

In answering the question, the majority began its discussion with *Smith v. California*, 361 U.S. 147, 80 S. Ct. 215 (1959). In that case, the Supreme Court struck down an ordinance that imposed criminal liability upon a bookseller for possession of an obscene book. The ordinance did not condition the

liability upon the seller's knowledge that the book was obscene. The Ninth Circuit panel applied *Smith*'s explanation of the harm in applying strict liability:

> The Court noted that legal doctrines such as strict liability, although generally constitutional, "cannot be applied in settings where they have the collateral effect of inhibiting the freedom of expression, by making the individual the more reluctant to exercise it." 858 F.2d at 539.

The *District Court* majority then pointed to several more U.S. Supreme Court decisions where the Court held strict liability could not be imposed on statutes regulating subject matter governed by the freedoms of expression. The panel quoted from *New York v. Ferber*, 458 U.S. 747, 765, 102 S. Ct. 3348, 3357 (1982), a decision that addressed a law prohibiting sexually explicit depictions of minors:

> As with obscenity laws, criminal responsibility may not be imposed without some element of scienter on the part of the defendant. (Citing *Smith*) 858 F.2d at 539.

The Ninth Circuit panel read the Supreme Court cases to mean "a speaker may not be put at complete peril in distinguishing between protected and unprotected speech." Producing films showing 18-to-20-year olds engaged in sexually explicit conduct is expression protected by the First Amendment. The spectre of strict liability would chill that protected expression by intimidating the producer into avoiding any risk. The 18, 19 or 20-year-old might turn out to be 15, 16

or 17. The producer sacrifices artistic or literary value for fear of prosecution. 858 F.2d at 540. This Court's decision in one of the Hustler Magazine cases was brand new when the Ninth Circuit decided *District Court*, and the panel immediately applied it:

> As the Court noted only this Term, "a rule that would impose strict liability on a publisher for [unprotected speech] would have an **undoubted** chilling effect on free speech . . . that does have constitutional value. *Hustler Magazine v. Falwell* ___ U.S. ___, 108 S. Ct. 876, 880 (1988). *District Court*, 858 F.2d at 540. (emphasis added)

With all Supreme Court caselaw weighing against the imposition of strict liability, the *District Court* opinion concluded that Section 2251(a) would not have to be struck down if it could be construed to allow a mistake-of-fact defense. Although it was clear Congress did not intend scienter to be an element, legislative intent did not rule out an affirmative defense. Engrafting the defense onto the statute does not ignore legislative intent, and it saves the statute from invalidation. A statute must be construed to save it against constitutional attack:

> We have little doubt that Congress would prefer section 2251(a) with a reasonable mistake of age defense to no statute at all. *District Court*, 858 F.2d at 542.

In the instant case, Mr. Heath did not ask for dismissal or invalidation of the statute. He simply asked for leave to present a defense of mistake of fact

to a jury. His defense would not be solely based on his own testimony, or the testimony of Ryan Miller, that the young women were saying they were 19 and 18 years old. (Motion for Ruling, Doc 26, p. 8) The facts and circumstances also showed the young women were acting as if they were older than their years. In *District Court*, the majority noted that the defense intended to introduce evidence that 16-year-old Traci Lords appeared "physically mature," and that "her demeanor, sophistication and apparent sexual experience belied her minority," when she appeared in *Those Young Girls*. 858 F.2d at 540.

In the instant case there is no evidence in the record as to the physical appearance of C.E. and K.F. There is undisputed evidence, however, that the young women showed up at Mr. Heath's residence uninvited, and that Mr. Heath did not even know who they were. They had been drinking vodka. They continued drinking other alcoholic beverages when they joined a small party of older adults who were drinking around a bonfire. Unprompted, they chose to put on a sexually explicit performance for the others around the fire. This included one of the girls exposing her breast while the other "repeatedly kisses" it. The young women immediately accepted an offer of payment to make an explicit video in a private setting inside Mr. Heath's house. They readily agreed to begin that private performance by engaging in oral sex with each other. (PSIR, ¶ 17, 21, 22, 24, 31, Doc 71, pp. 6-9)

As the defendant's evidence in *District Court* was described, the same can be said of the evidence in the instant case. In assessing the conduct of C.E. and K.F., their "demeanor, sophistication, and apparent sexual experience belied [their] minority." 858 F.2d at 540.

Judge Reade's denial of Mr. Heath's motion was based upon the Eighth Circuit's decision in *Gilmour v. Rogerson*, 117 F.3d 368 (8th Cir. 1997). That habeas review of a state conviction under Iowa Code 728.12(1), analyzed *District Court* in deciding whether the First Amendment required the opportunity for a defendant to assert a defense of mistake of age. Judge Reade correctly pointed out that the Iowa statute was substantially similar to 18 U.S.C. 2251(a) such that the issue Mr. Heath raised could be decided on the basis of the constitutional analysis in *Gilmour*. (Doc. 40, p. 6) Judge Reade also correctly identified the three reasons the two-judge majority cited in *Gilmour* to deny constitutional relief:

> Those reasons are as follows: (1) there is a strong interest in banning the sexual exploitation of a child whether he or she is truthful or untruthful about his or her age, and a mistake of age defense is directly contrary to such interest: (2) the statute is aimed at producers of child pornography who deal directly with the minor victim and, unlike distributors, producers are in a position to readily and independently confirm the age of the actor or model; and (3) the chilling effect on otherwise protected sexually explicit adult pornography through the reluctance to use

> young-looking models is qualitatively weak. (Order, Doc. 40, pp. 6-7) (See: *Gilmour*, 117 F.3d at 372-374). (App. 18)

Mr. Heath will demonstrate the *Gilmour* panel majority was defective on all three reasons for denying constitutional protection. The dissection of *Gilmour* is important because virtually all decisions in the Eighth and other circuits flow from the *Gilmour* decision. Mr. Heath is assisted by the dissenting opinion the Honorable Morris Sheppard Arnold authored in *Gilmour*.

A. The Strength of the Governmental Interest.

Here, the *Gilmour* panel majority said the State's interest "in banning sexual exploitation is very strong but the mistake-of-age defense is directly contrary to that interest." The majority added that the defense would "typically" involve facts like *Gilmour*, where "the minor was a willing, perhaps deceitful participant." The Government's "very strong" interest extends to protecting minors from this "self-destructive" behavior. 117 F.3d at 372.

This was an irrelevant point, and that makes it a strange place to start. Neither Mr. Gilmour nor the defendants in *District Court* were claiming the Government did not have a strong interest in protecting minors. The question was whether the exercise of that strong interest would chill protected expression if the law did not make some provision for the question of

scienter. The question was not, and is not, whether the Government has a proper or "very strong" interest in prosecuting child pornographers. The question is whether that enforcement will chill legitimate, protected constitutional rights if the prosecution is not properly tempered. The question is not what is the best way to achieve full enforcement of the law and prevention of crime. The question is what is the best way to protect the First Amendment freedoms. Indeed, the *District Court* majority stated:

> As to those rare cases where otherwise culpable defendants may be exonerated on the basis of a reasonable mistake of age defense, we can only note that even as compelling a societal interest as the protection of minors must occasionally yield to specific constitutional guarantees. (Citing *Coy v. Iowa*, 487 U.S. 1012, 108 S. Ct. 2798 (1988)) 858 F.2d at 543.

The *Gilmour* panel cites no authority for this first reason. An appellate court cannot simply impose its own opinion that a legislative end is so important that Congress intended to impose strict liability. Where Congress has not clearly expressed intent to create strict liability, the courts must impose the rule of this Court's "cases interpreting criminal statutes to include broadly applicable scienter requirements, *even where* the statute by its terms does not contain them." *X-Citement Video*, 513 U.S. at 70, 115 S. Ct. at 468. (emphasis added) The *Gilmour* majority exercised its presumption in the exact wrong direction.

Rather than imposing this Court's clear rule that presumes *mens rea* is required, the *Gilmour* decision presumes Congress believed child pornography is so insidious that the statute must dispense with scienter.

B. Statute Aimed at Producers Rather than Distributors.

Again, this distinction has nothing to do with the chilling effect caused by strict liability. This was a surprising point for the two-judge majority in *Gilmour* because Judge Loken's opinion starts with two citations to Supreme Court decisions:

> In *New York v. Ferber*, 458 U.S. 747, 765, 102 S. Ct. 3348, 3358-59, 73 L. Ed. 2d 1113 (1982), the Supreme Court upheld a broad child pornography statute but cautioned that, "[a]s with obscenity laws, criminal responsibility may not be imposed without some element of scienter on the part of the defendant." In *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78, 115 S. Ct. 464, 472, 130 L. Ed. 2d 372 (1994), the Court cited that caution as "suggest[ing] that a [child pornography] statute completely bereft of a scienter requirement as to the age of the performers would raise serious constitutional doubts." *Gilmour*, 117 F.3d at 369.

The panel then attempted to distinguish *Ferber* and *X-Citement Video* under this second reason:

> *Ferbers*'s general reference to "some element of scienter" was in the context of a statute

> that criminalized the production *and distribution* of child pornography. *X-Citement Video* was a prosecution of movie producers, but the federal statute at issue extended to distributors as well; thus, the Court was required to construe the statute's *mens rea* element in this broader context, and in doing so it expressly noted that
>
> > in the criminalization of pornography production . . . the perpetrator confronts the underage victim personally and may reasonably be required to ascertain that victim's age. The opportunity for reasonable mistake as to age increases significantly once the victim is reduced to a visual depiction, unavailable for questioning by the distributor or receiver. *Gilmour*, 117 F.3d at 373. (quoting footnote 2 from *X-Citement Video*)

The reliance by the two judges in *Gilmour* upon a footnote in *X-Citement Video* was severely misplaced. Only *Ferber*, not *X-Citement Video*, decided a question concerning a chilling effect on the First Amendment. The *Ferber* decision addressed whether a state statute that prohibited production of child pornography was under-inclusive or overly broad such that it punished conduct that was protected by the First Amendment. The *Ferber* court simply said child pornography is not entitled to First Amendment protections, **as long as** the conduct prohibited is adequately defined. The Government has this power even if the sexually explicit conduct is not obscene.

458 U.S. at 756-757, 102 S. Ct. at 3354. The question in *Ferber* was whether child pornography could be prosecuted if it was not obscene. Again, neither Mr. Gilmour, nor the defendants in *District Court* challenged governmental authority to regulate child pornography through criminal statutes.

The *X-Citement Video* decision does not directly engage in any type of constitutional analysis. It simply employs a legislative interpretation to 18 U.S.C. 2252, that includes a presumption against creating constitutional issues. The only reason *X-Citement Video* even mentions Section 2251(a) is for the purpose of statutory interpretation. Section 2252 does include the word "knowingly", while 2251(a) does not. That distinction between the two sections is what the *District Court* majority used to conclude 2251(a) does not require the Government to prove knowledge as an element of the offense. Unlike *Gilmour*, however, the *District Court* decision preserves the presumption of scienter by concluding a defense to Section 2251(a) is entitled to an affirmative defense of reasonable mistake of fact. That protection for a defendant is not as strong as requiring the Government to prove an element beyond a reasonable doubt. The omission of "knowledge," "knowing," or "knowingly" from 2251(a) explains the difference between a producer and a distributor, not an unspoken legislative intent to create strict liability. In fact, that footnote 2 in *X-Citement Video* refers the reader to footnote 5 in the same opinion where the Court cites *District Court* with approval. 513 U.S. at

77, 115 S. Ct. at 471. In the course of statutory analysis in *X-Citement Video*, this Court referred to its earlier decision involving a firearms criminal statute that considered strict liability. That statute prohibiting possession of automatic weapons also contained no words as to "knowledge" that would require *mens rea*. In that earlier decision, the Court cautioned that harsh penalties of imprisonment must be "a significant consideration in determining whether the statute should be construed as dispensing with *mens rea*." *Staples v. U.S.*, 511 U.S. 600, 616, 114 S. Ct. 1793, 1802 (1994) (cited and quoted in *X-Citement Video*, 513 U.S. at 71, 115 S. Ct. at 468). The *Gilmour* majority's quote from footnote 2 in *X-Citement Video* is used completely out of context and is highly misleading. The footnote makes reference to *Morissette v. U.S.*, 342 U.S. 246, 72 S. Ct. 240 (1952) only for the purpose of explaining Congress's reasoning and intent for including "knowingly" in Section 2252, while omitting it from 2251(a). In fact, in the regular paragraph directly following the footnote, in *X-Citement Video,* the decision makes this more important reference to *Morissette*:

> *Morissette*, reinforced by *Staples*, instructs that the presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct. 513. U.S. at 469, 115 S. Ct. at 772.

The *Gilmour* majority makes these misplaced references to *Ferber* and *X-Citement Video*, but Judge

Loken does not explain why he abandons the rules presuming the requirement of scienter that he quotes from those two cases in the first two sentences of his opinion. 117 F.3d at 369. With no guidance from any decision that is actually applicable to the question, the two-judge majority in *Gilmour* simply decides Section 2251(a) is a strict liability criminal offense.

C. The Chilling Effect is Qualitatively Weak.

When the *Gilmour* decision finally addressed the chilling effect caused by this new rule for the imposition of strict liability, the two-judge majority relied on a rationale that has never enjoyed support in a majority decision in the Supreme Court:

> The First Amendment protection accorded to adult pornography "is not as extensive as that accorded to other speech." *X-Citement Video*, 513 U.S. at 84, 115 S. Ct. at 474. (Dissenting opinion of Justice Scalia, citing the plurality opinion in *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 61, 96 S. Ct. 2440, 2448, 49 L. Ed. 2d 310 (1976), and other cases). Although worthy of protection, its status on the relative periphery of the First Amendment is relevant in weighing whether a state statute that legitimately protects children against sexually exploitive conduct must be struck down as *substantially* over broad. 117 F.3d at 373. (emphasis supplied)

Judge Arnold made this observation on Judge Loken's reliance upon Justice Scalia's dissent: "A dissenting opinion is an odd place at best to look for an applicable legal proposition." Judge Arnold went on to explain that the majority's reliance on *Young* was misguided as well. The passage cited in *Young* was discussing the propriety of the extraordinary remedy of an injunction, and did not suggest that adult pornography "was somehow less worthy of First Amendment protection." 117 F.3d at 374. (Dissenting opinion)

The *District Court* majority also addressed an argument that adult entertainment was afforded some sort of lesser protection under the First Amendment. In a late-breaking argument the Government first brought up at oral argument before the Ninth Circuit panel, the claim was that "nonobscene blue movies" somehow enjoy a lesser protection under the First Amendment. The Government in *District Court* was also pointing to *Young* for that proposition. The decision pointed out that the proposition did not enjoy the support of the majority or even a plurality in *Young*. On that point, Justice Powell had parted with the dissenting four justices and given the fifth vote against establishing such a rule. Justice Powell wrote:

> I do not think we need reach, *nor am I inclined to agree with*, the holding in Part III (and supporting discussion) that nonobscene, erotic materials may be treated differently under First Amendment principles from other forms of protected expression. *Young*, 427

> U.S. at 73, 96 S. Ct. at 2453, ftn. 1 (quoted in *District Court*, 858 F.2d at 541). (emphasis supplied by Ninth Circuit)

Two years after *Young*, a majority of the Supreme Court rejected the same proposition of a sliding scale for First Amendment protection. The decision was filed on George Carlin's famous "Filthy Words" monologue. Writing in concurrence, Justice Powell said:

> I do not subscribe to the theory that the Justices of this Court are free generally to decide on the basis of its content which speech protected by the First Amendment is most "valuable" and hence deserving of the most protection, and which is less "valuable" and hence deserving of less protection. (Citing to *Young*). In my view, the result in this case does not turn on whether Carlin's monologue, viewed as a whole, or the words that constitute it, have more or less "value" than a candidate's campaign speech. This is a judgment for each person to make, not one for the judges to impose upon him. *F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 761, 98 S. Ct. 3026, 3046-47 (1978).

One man's trash is another man's treasure. The rejection of the sliding scale of protection saves the courts from getting into a laborious and improper exercise in legislating morals and artistic taste. The two judges in *Gilmour* took the step that the Supreme Court repeatedly refused to take. In rejecting the proposition in *District Court*, the majority said until the Supreme Court "speaks otherwise," the Court must

extend the full protection of the First Amendment to nonobscene erotica, "as fully as the heartland of political, literary and scientific expression and debate." 858 F.2d at 542. The Supreme Court has not spoken otherwise. In fact, in just the last term this Court rejected the Government's argument that visual images depicting animal cruelty were of such limited value that they would not be protected by the First Amendment. Chief Justice Roberts wrote:

> Our decisions in *Ferber* and other cases cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the First Amendment. *U.S. v. Stevens*, 130 S. Ct. 1577, 1587 (2010).

Although Judge Loken placed adult pornography on the "periphery" of First Amendment protected speech, he still had it within the purview of protection. Even if there was debate as to whether the speech fell within or without protected speech, that debate would only prove the wisdom of the rule of statutory construction. The Court must presume Congress intended to avoid a result that would be constitutionally questionable. That rule merely complements the rule that scienter must be presumed.

A survey of a later Eighth Circuit decision and decisions in other circuits shows a consistent failure to properly apply the statutory interpretation rules as this Court did in *X-Citement Video* and the Ninth Circuit did in *District Court*. In *U.S. v. Wilson*, 565 F.3d 1059 (8th Cir. 2009), a panel concluded *Gilmour*'s treatment of the Iowa statute could be

applied to Section 2251(a). The *Wilson* panel abandoned the *Gilmour* rationale concerning the periphery of protected speech. The *Wilson* panel did employ a defective analogy from *Gilmour* as a reason to abandon the presumption for scienter:

> Producers of child pornography, unlike distributors and downstream consumers, are more akin to statutory rapists who are not entitled to *mens rea* safeguards.

This was, again, a misguided reliance on this Court's footnote 2 in the *X-Citement Video* decision. *Wilson*, 565 F.3d at 1067-1068. That footnote does not discuss statutory rape in order to suggest 2251(a) would not be interpreted with a presumption of scienter. Again, that footnote 2 is only in support of requiring "knowledge" as an element under Section 2252, and it refers the reader to footnote 5, where the Court cites *District Court* with approval. Additionally, Judge Arnold clearly explained in his dissent in *Gilmour* why an analogy to a statutory rape statute "makes for an imperfect analogy." The analogy fails "because there is no constitutional right to engage in consensual intercourse with anyone. . . . but there is a right to take erotic pictures." Judge Arnold was of the opinion the better course was to "take seriously" this Court's "admonition" in *X-Citement Video* . . . that "a statute that is completely bereft of a scienter requirement as to the age of performers would raise serious constitutional doubts. . . ." *Gilmour*, 117 F.3d at 374-375. Other circuits have failed to follow this Court's admonition.

In *U.S. v. Malloy*, 568 F.3d 166, 172-177 (4th Cir. 2009), a three-judge panel engaged in an extended constitutional analysis on the defendant's claim that he should have been entitled to an affirmative defense. The panel almost completely failed to make any mention of the statutory presumption of scienter, however. The *Malloy* panel looked to *Gilmour* for this sweeping conclusion that is plainly incorrect:

> The Court clarified that under "criminal statutes that protect children from sexual predators. . . . the child's age is a long-established exception to the rule that proof of *mens rea* is required . . . " *Malloy*, 568 F.3d at 174.

If the foregoing quote were accurate, this Court never would have urged the admonition in *X-Citement Video* that a statute "bereft of a scienter requirement as to the age of a performer would raise serious constitutional doubts." 513 U.S. at 78, 115 S. Ct. at 472. After quickly dispensing with the presumption of *mens rea*, the *Malloy* panel then goes on with heavy reliance on *Gilmour* to explain the great importance of controlling child pornography. Additionally, the panel concluded relatively few people would be chilled from expressing First Amendment rights. Those reasons purportedly justified denial of an affirmative defense. *Malloy*, 568 F.3d at 174-176.

In *U.S. v. Deverso*, 518 F.3d 1250 (11th Cir. 2008), the panel failed to engage in any analysis at all. It simply and summarily dismissed the claim of a right to an affirmative defense by citing *U.S. v. Crow*, 164

F.3d 229, 236 (5th Cir. 1999) and *Gilmour*. The *Crow* case was not even one that analyzed a right to an affirmative defense. In *Crow*, the defendant wrongly claimed he was entitled to a marshaling instruction under Section 2251, that required the Government to prove knowledge as an element. In fact, the *Crow* panel cited *District Court* in support of its conclusion that knowledge is not an element. *Crow*, 164 F.3d at 236.

The Sixth Circuit's decision in *Humphrey*, that decided the Ninth Circuit should "stand alone," again misstates the meaning of footnote 2 in this Court's opinion in *X-Citement Video*. The opinion then goes on to dispense with *mens rea* by relying on other circuits, rather than examining the long history in this Court of construing statutes to include *mens rea* and avoid constrictions that create constitutional doubt. *Humphrey*, 608 F.3d at 960. The reliance on other circuits is misplaced for two reasons. First, the *Humphrey* panel relies on the defective *Wilson* decision discussed above. That decision incorrectly cherry-picked language from the now famous footnote 2 in this Court's decision in *X-Citement Video*. The *Humphrey* panel then relies on three circuit decisions that speak only to the fact knowledge is not an element the Government has to prove under 2251(a). One decision is the *Crow* case discussed above. The decision *Humphrey* cites from the Second Circuit not only addressed knowledge as an element, it cites *District Court* as authority on that point. *U.S. v. Griffith*, 284 F.3d 338, 349 (2nd Cir. 2002). The third

case the *Humphrey* opinion relied on in rejecting an affirmative defense provision was *U.S. v. Johnson,* 376 F.3d 68, 693 (7th Cir. 2004). That decision not only was confined to the question of whether 2251(a) required an element of knowledge. It went on to conclude an attempt to commit the crime under Section 2251(a) *would* require an element of knowledge of age.

CONCLUSION

All of the circuit decisions that reject *District Court* do so without analyzing this Court's traditional rule requiring scienter as a component of a criminal statute, whether it appears in the text or not. All of those decisions dispense with *mens rea* without consideration of the harsh penalties of imprisonment under Section 2251. None of those decisions consider the rule of statutory construction that requires the presumption Congress did not intend to enact a statute that would raise constitutional doubts. For all of these reasons, this Court must grant Certiorari. The Court must clarify its decision in *X-Citement Video* and all the decisions that preceded it in ruling scienter must be presumed, especially where the penalty is harsh and constitutional firmity would be in doubt.

Respectfully submitted,

KENT A. SIMMONS
Attorney for Petitioner

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 10-1333

United States of America,	*	
	*	
Appellee,	*	Appeal from the United
	*	States District Court for
v.	*	the Northern District of
Ryan Dean Heath,	*	Iowa.
	*	
Appellant.	*	

Submitted: September 23, 2010
Filed: November 16, 2010

Before GRUENDER, ARNOLD, and SHEPHERD, Circuit Judges.

GRUENDER, Circuit Judge.

Ryan Dean Heath entered a conditional guilty plea to producing child pornography, a violation of 18 U.S.C. § 2251(a), (e). Section 2251(e) provides a statutory range of 15 to 30 years' imprisonment. The district court[1] calculated an advisory sentencing guidelines range of 235 to 293 months' imprisonment, based on an offense level of 35 and a criminal history category of IV, and sentenced Heath at the top of the advisory guidelines range. Heath filed this appeal, arguing that his conviction should be vacated because the district court determined that he would not be

[1] The Honorable Linda R. Reade, Chief Judge, United States District Court for the Northern District of Iowa.

allowed to present a mistake-of-age defense or, failing that, that his sentence is procedurally unsound and substantively unreasonable. We affirm.

On April 21,2007, three minor girls – C.E.,age 15;K.F., age 17;andB.B.,age 14 – attended a party at Heath's home in Cedar Falls, Iowa. C.E. and K.F. consumed alcohol, both before arriving at the party and throughout the evening, and became intoxicated. The parties dispute whether the girls misrepresented their ages. At some point in the evening, around a bonfire outside Heath's house, C.E. and K.F. began acting provocatively. They kissed each other, and one of the girls repeatedly kissed the exposed breast of the other.

While C.E. and K.F. were kissing each other, someone at the party offered them one hundred dollars to make a video. C.E., K.F., and at least three men, including Heath, went into a bedroom in Heath's house, where Heath and one of the other men engaged in sexual conduct with C.E. and K.F. Heath initially videotaped C.E. and K.F. performing oral sex on each other and then handed the video camera to someone else while he and another man had sex with the two girls. The next day, C.E. was treated at Covenant Hospital and reported the sexual assault.

Heath was arrested and charged with one count of producing child pornography and one count of possessing child pornography. Heath initially pled not guilty, but at a change-of-plea hearing several weeks later he entered a conditional plea of guilty to the

charge of producing child pornography. Heath reserved the right to withdraw the guilty plea if the district court determined that he could assert a mistake-of-age defense at trial. If the district court denied his request, Heath reserved the right to appeal the issue. After the district court refused to allow Heath to present his mistake-of-age defense, it sentenced him to 293 months' imprisonment and dismissed the remaining count on the motion of the Government.

Heath first argues that the district court erred in refusing to allow him to present a mistake-of-age defense, which he claims is required by the First Amendment, citing *New York v. Ferber,* 458 U.S. 747, 765 (1982) ("As with obscenity laws, criminal responsibility may not be imposed [for distributing child pornography] without some element of scienter on the part of the defendant."), and *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994) ("[A] statute [criminalizing distribution of child pornography] completely bereft of a scienter requirement as to the age of the performers would raise serious constitutional doubts."). After reviewing this issue *de novo, see United States v. McCloud,* 590 F.3d 560, 567 (8th Cir. 2009), *cert, denied,* ___ U.S. ___, 78 U.S.L.W. 3170 (U.S. Oct. 4,2010) (No. 09-1177), we find that Heath's argument is foreclosed by our decision in *United States v. Wilson,* 565 F.3d 1059 (8th Cir. 2009), *cert, denied,* ___ U.S. 130 S. Ct. 1052 (2010), which relied on the distinction between those who merely distribute child pornography and those who produce

it to hold that "the First Amendment does not require a reasonable-mistake-of-age defense to charges of producing child pornography in violation of section 2251(a)." *Id.* at 1069; *see also United States v. Pliego*, 578 F.3d 938, 943-44 (8th Cir. 2009), *cert. denied*, ___ U.S. ___, 130 S. Ct. 1109 (2010); *Gilmour v. Rogerson*, 117 F.3d 368, 373 (8th Cir. 1997). Since "one panel may not overrule an earlier decision by another," *Jackson v. Ault*, 452 F.3d 734, 736 (8th Cir. 2006), we reject Heath's argument that he was entitled to present a mistake-of-age defense.

Heath also challenges his sentence on both procedural and substantive grounds. Following *Gall*, we first "ensure that the district court committed no significant procedural error," including "failing to calculate (or improperly calculating) the Guidelines range." *Gall v. United States*, 552 U.S. 38, 51 (2007). To the extent an asserted procedural error involves interpretation of the guidelines, we review the district court's construction and application of the sentencing guidelines *de novo*. *United States v. Cordy*, 560 F.3d 808, 817 (8th Cir.), *cert. denied*, ___ U.S. ___, 130 S. Ct. 271 (2009). Second, we "consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard." *Gall*, 552 U.S. at 51.

Heath first challenges the district court's determination that he has a category IV criminal history. He objects to 3 of his 8 criminal history points, which were based on his 2006 assault conviction. *See* U.S.S.G. § 4A1.1(a) ("Add 3 points for each prior

sentence of imprisonment exceeding one year and one month."). Heath was initially sentenced to 2 years' imprisonment for this offense, but the sentence was suspended and 2 years of probation were imposed. Because a "sentence of imprisonment" does not include any part of the sentence that was suspended, § 4A1.2(b)(2), this sentence would have resulted in only 1 criminal history point, *see* § 4A1.1(c). However, in April 2008, following the events which led to this prosecution and appeal, Heath's probation was revoked, and he was ordered to serve the 2-year prison sentence based on the following violations: (1) providing alcohol to a minor, (2) enticing a minor, (3) exploiting a minor, and (4) possessing a firearm as a felon. The first three violations were based on the conduct that led to this case. Heath argues that including these 3 points under § 4A1.1(a) constituted impermissible double counting because the prison sentence imposed on his revocation was based on the same conduct underlying this instant prosecution.[2]

Although § 4A1.2(k)(1) instructs that "[i]n the case of a prior revocation of probation," the court should "add the original term of imprisonment to any term of imprisonment imposed upon revocation," and

---

[2] Since Heath's probation revocation was based in part on the firearm possession, which was not part of the conduct leading to this case, the Government argues that the probation was not revoked based on conduct relevant to the instant offense, and accordingly there was no double counting. This argument requires more assumptions than we are willing to make.

use "[t]he resulting total . . . to compute the criminal history points for § 4A1.1(a)," Heath argues that § 4A1.2(k)(1) "merely discusses . . . how to score the criminal history points and does not take into consideration the concept of double counting." He urges that "when the imposition of criminal history points is based on relevant conduct to the instant offense, . . . it [amounts] to double counting," because of § 4A1.2(a)(1), which provides that "prior sentences," for the purposes of § 4A1.1, only include sentences "imposed . . . for conduct not part of the instant offense." Heath concludes that without the 2 additional points his criminal history category should have been III, resulting in a corresponding advisory guidelines range of 210 to 262 months.

We have previously explained that "[d]ouble counting occurs when one part of the Guidelines is applied to increase a defendant's punishment on account of a kind of harm that has already been fully accounted for by application of another part of the Guidelines." *United States v. Rohwedder,* 243 F.3d 423, 426-27 (8th Cir. 2001) (quoting *United States v. Hipenbecker,* 115 F.3d 581, 583 (8th Cir. 1997)). Neither party cites any case from this circuit addressing the specific issue raised by Heath, and we are aware of none. The Government, however, relies on cases from three of our sister circuits, all of which conclude that assessing criminal history points for a prison sentence arising from the revocation of probation and imposition of a term of imprisonment based on the instant offense conduct is permissible. *See United*

States v. Dozier, 555 F.3d 1136,1141 (10th Cir. 2009); *United States v. Wheeler,* 330 F.3d 407, 412-13 (6th Cir. 2003); *United States v. Franklin,* 148 F.3d 451, 461-62 (5th Cir. 1998); *accord United States v. Madrigal-Rodriguez,* 60 F. App'x 5, 6 (9th Cir. 2003) (unpublished).

In *Dozier,* for example, the Tenth Circuit rejected a claim that § 4A1.2(a)(1) bars assigning criminal history points for a sentence imposed following the revocation of probation based on the offense conduct, holding that this argument "ignores the relation-back aspect of the law – incarceration resulting from a probation revocation is punishment for the original offense. It is imposed as a consequence of the defendant's breach of probation terms but is not punishment for the breach." *Dozier,* 555 F.3d at 1140; *see also Wheeler,* 330 F.3d at 412; *Franklin,* 148 F.3d at 462 n.48. The analysis used by these circuits is supported by the Supreme Court's holding, in other contexts, that "[a] suspended sentence is a prison term imposed for the offense of conviction. Once the prison term is triggered, the defendant is incarcerated not for the probation violation, but for the underlying offense." *Alabama v. Shelton,* 535 U.S. 654,662 (2002); *see also Johnson v. United States,* 529 U.S. 694, 701 (2000). Therefore, although Heath's instant offense conduct played a part in the revocation of his probation, his post-revocation sentence was imposed as punishment solely for the 2006 assault conviction, which is not "a kind of harm that has already been fully accounted for" in calculating his offense level.

See Rohwedder, 243 F.3d at 426-27. Accordingly, considering the post-re ocation sentence in calculating Heath's criminal history category does not constitute double counting.

Finally, Heath argues that the district court abused its discretion by refusing to impose a sentence below the initially-calculated guidelines range. He argues that a sentence below the guidelines range was warranted because the victims' conduct contributed to the offense, pointing to C.E. and K.F.'s illegal consumption of alcohol and provocative actions. He also argues that his criminal history was overstated, based in part on the same double-counting argument discussed earlier. Heath raised both arguments at sentencing, but the district court rejected them and sentenced Heath at the top of the advisory guidelines range.

It is unclear whether Heath's challenge is based on the trial court's refusal to depart based on U.S.S.G. § 5K2.10 (victim's conduct) and § 4A1.3(b)(1) (over-representative criminal history), or the trial court's refusal to vary based on the 18 U.S.C. § 3553(a) factors. To the extent Heath challenges the district court's refusal to depart, his challenge fails because, even though the guidelines are now advisory, "[w]e will generally not review a decision not to grant a downward departure unless the district court had an unconstitutional motive or erroneously thought that it was without authority to grant the departure." *United States v. Johnson,* 517 F.3d 1020, 1023 (8th Cir. 2008). Heath has not argued that the district

court had an unconstitutional motive, and the sentencing transcript shows that the court was aware of its authority to depart.

To the extent that Heath argues that his sentence is substantively unreasonable because the court refused to vary from the advisory guidelines range, his challenge still fails to persuade. Where, as here, the sentence is within the correctly-calculated guidelines range, "we accord it a presumption of reasonableness." *United States v. Harris,* 493 F.3d 928, 932 (8th Cir. 2007). The district court determined that "a sentence of 293 months is the appropriate disposition after analyzing carefully everything I know about this case and applying the statutory factors at [18 U.S.C. §] 3553(a)." Based on the facts of this case – sexual exploitation of two intoxicated, underage girls – and all of the § 3553(a) factors, we conclude that Heath's within-trie-guidelines sentence of 293 months' imprisonment is not substantively unreasonable.

Accordingly, we affirm Heath's conviction and sentence.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. RYAN DEAN HEATH, Defendant.	No. CR09-2003-LRR (Filed May 1, 2009)

I. INTRODUCTION

The matter before the court is the defendant's motion for ruling on legal issue and/or ruling on proposed jury instruction (docket no. 26). The defendant filed such motion on March 23, 2009. The government filed a response (docket no. 35) on April 2, 2009. The defendant did not file a reply, and the time for doing so passed.

II. RELEVANT PRIOR PROCEEDINGS

On January 28, 2009, the grand jury returned and the government filed an indictment against the defendant. Count 1 of the indictment charged the defendant with producing and attempting to produce child pornography, in violation of 18 U.S.C. § 2251(a), 18 U.S.C. § 2251(e) and 18 U.S.C. § 2. Count 2 of the indictment charged the defendant with possessing or attempting to possess child pornography, in violation

of 18 U.S.C. § 2252A(a)(5)(B), 18 U.S.C. § 2252A(b)(2) and 18 U.S.C. § 2.

On March 5, 2009, the defendant filed a motion to suppress. On March 17, 2009, the government filed a response to the defendant's motion to suppress. On March 20, 2009, Magistrate Judge Jon S. Scoles held a hearing on the defendant's motion to suppress.

On March 23, 2009, the defendant notified the court of his intent to enter a conditional guilty plea pursuant to a plea agreement. The defendant made clear in his notice that he wished to preserve his right to appeal: (1) the legal and instructional issue of whether a mistake of age defense is available when charged under 18 U.S. C. § 2251(a) and 18 U.S.C. § 2251(e); (2) his sentence; and (3) other usual and customary findings reserved for appeal in plea agreements.

On the same date, the defendant filed the instant motion for ruling. In the motion for ruling, the defendant asks the court to: (1) declare that mistake of age is available as a defense to a charge under 18 U.S.C. § 2251(a) and 18 U.S.C. § 2251(e); and (2) give an appropriate instruction to the jury. The defendant contends that Federal Rule of Criminal Procedure 12(b)(2) provides the court with the authority to determine whether mistake of age may be asserted as a defense to a charge under 18 U.S.C. § 2251(a) and 18 U.S.C. § 2251(e). As authority for the proposition that mistake of age may be asserted as a defense, the defendant relies on *United States v. United States*

Dist. Court, 858 F.2d 534 (9th Cir. 1988). The defendant also alerts the court to contrary authority, including *Gilmore v. Rogerson,* 117 F.3d 368 (8th Cir. 1997), and *United States v. Deverso,* 518 F.3d 1250 (11th Cir. 2008).

On March 24, 2009, Judge Scoles filed a report and recommendation concerning the defendant's motion to suppress.

On March 30, 2009, the defendant appeared before Judge Scoles for a change of plea hearing. At such hearing, the defendant conditionally pleaded guilty to count 1 of the indictment. On the same date, Judge Scoles entered a report and recommendation that a United States District Court Judge accept the defendant's conditional plea of guilty.

On April 2, 2009, the government filed a response to the defendant's motion for ruling. In its response, the government contends that it is appropriate for the court to address the legal issue presented and maintains that the defendant may not rely on mistake of age as a defense.

On the same date, the defendant filed a waiver of objections to the report and recommendation concerning his conditional guilty plea. On April 7, 2009, the court entered an order adopting the report and recommendation pertaining to the defendant's conditional guilty plea. On April 22, 2009, the court also entered an order that made clear the time for filing objections expired and adopted the report and

recommendation pertaining to the defendant's motion to suppress.

The court now turns to consider the defendant's motion for ruling.

III. RELEVANT FACTUAL BACKGROUND

In April of 2007, the defendant held a party at his house on Cottage Row Road in Cedar Falls, Iowa. In exchange for making a private video, the defendant offered $100.00 to a girl who was 15 years old and $100.00 to a girl who was 17 years old. Once inside the defendant's house, the defendant videotaped sexual activity involving the two underage girls. The defendant also engaged in sexual activity with one of the minor females while another participant videotaped such activity. The defendant maintains that he did not know or believe that the girls were under the age of 18.[1]

IV. ANALYSIS A. Authority to Entertain the Motion for Ruling

Federal Rule of Criminal Procedure 12(b)(2) provides:

Rule 12. Pleadings and Pretrial Motions

* * *

---

[1] The court notes that 18 U.S.C. § 2256(1) sets the age of majority at 18.

> **(b) Pretrial Motions.**
>
> * * *
>
> (2) **Motions That May Be Made Before Trial.** A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue.

Fed. R. Crim. P. 12(b)(2).

Such rule clearly states that "a party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue." Fed. R. Crim. P. 12(b)(2). "[T]he general issue" is whether the defendant is guilty of the charged offenses. *See, e.g., United States v. Cline,* 362 F.3d 343, 349 (6th Cir. 2004) ("Determining the legal meaning of [a domestic violence order] did not require trial of the general issue of guilt on any count and thus did not invade the province of the jury."); *United States v. Suescun,* 237 F.3d 1284, 1286 (11th Cir. 2001) (defining "trial of the general issue" as "whether [the defendant] was guilty of the charged offenses"). Here, determining whether the defendant can present a mistake of age defense does not require "a trial of the general issue." Fed. R. Crim. P. 12(b)(2). Such a determination is purely a legal matter, and the court need not make any factual findings. Accordingly, the court holds that Federal Rule of Criminal Procedure 12(b)(2) provides the court with the authority to determine whether the defendant may assert mistake of age as a defense.

B. Determination of Whether Mistake of Age is Available as a Defense when Charged under 18 U.S.C. § 2251(a)

As a preliminary matter, the court notes that the defendant does not appear to claim the government is required to prove that he knew the girls were minors. In any event, such claim is foreclosed when an analysis of the plain language of 18 U.S.C. § 2251(a) is undertaken. *See United States v. Cacioppo,* 460 F.3d 1012, 1016 (8th Cir. 2006) ("It is well established that [the Eighth Circuit Court of Appeals] commence[s] any statutory interpretation with the statute's plain language."). The child pornography production statute provides that "[a]ny person who employs, uses, persuades, induces, entices, or coerces any minor to engage in . . . any sexually explicit conduct for the purpose of producing any visual depiction of such conduct" shall be punished as provided by law. 18 U.S.C. § 2251(a). It requires proof that the persuasion or inducement of the minor be done "with the intent that such minor engage in[ ] any sexually explicit conduct for the purpose of producing any visual depiction of such conduct" and proof that the "visual depiction was produced using materials that have been mailed, shipped, or transported in interstate or foreign commerce . . . . " *Id.; see also United States v. Crow,* 164 F. 3d 229, 236 (5th Cir. 1999) (discussing requisite proof under 18 U.S.C. § 2251(a)). Thus, with regard to 18 U.S.C. § 2251(a), the government need not prove a defendant knew the age of the minor; " '[a] defendant's awareness of the subject's minority is not

an element of the offense.'" *Crow,* 164 F.3d at 236 (quoting *United States Dist. Court,* 858 F.2d at 538); *see also United States v. X-Citement Video, Inc.,* 513 U.S. 64, 76 n. 5, 115 S. Ct. 464, 130 L. Ed. 2d 372 (1994) (noting that producers may be convicted under 18 U.S.C. § 2251(a) without proof that they had knowledge of age); *United States v. Johnson,* 376F.3d 689, 693 (7th Cir. 2004) (concluding that knowledge of minor's age must be proved when charged with the attempt to produce child pornography and pointing out that knowledge of minor's age is not required when charged with a completed offense under 18 U.S.C. § 2251(a)); *United States v. Griffith,* 284 F.3d 338, 349 (2d Cir. 2002) (rejecting argument that the district court erred when charging the jury because 18 U.S.C. § 2251(a) does not require proof that the defendant actually knew the person depicted was in fact under 18 years of age); *cf. Deverso,* 518 F.3d at 1257 (concluding knowledge of age is not an element of an offense charged under 18 U.S.C. § 2251(c)).

Concerning the defendant's knowledge of the girls' ages, the court concludes that 18 U.S.C. § 2251(a) does not include an affirmative defense for reasonable mistake of age. In so concluding, the court declines to follow the Ninth Circuit Court of Appeals, which held that it was necessary to recognize mistake of age as an affirmative defense because age is the only distinguishing feature separating criminal conduct from legal conduct in child pornography production cases. *United States Dist. Court,* 858 F.2d at 542-44. The Ninth Circuit Court of Appeals opined

that imposing "strict liability . . . would seriously chill protected speech" under the First Amendment. *Id.* at 540. Rather than follow the Ninth Circuit Court of Appeals' analysis, the court concludes that the Eighth Circuit Court of Appeals' analysis in *Gilmore v. Rogerson, 111* F.3d at 368, applies with equal force when a defendant is charged with a completed offense under 18 U.S.C. § 2251(a).

In *Gilmore v. Rogerson,* the Eighth Circuit Court of Appeals considered the district court's denial of an application for a writ of habeas corpus and rejected the Ninth Circuit Court of Appeals' conclusion that a mistake of age defense must be written into 18 U.S.C. § 2251(a). *Gilmore,* 117 F.3d at 370-73 (parting company with *United States Dist. Court,* 858 F.2d 534). Although it did not make specific findings with respect to 18 U.S.C. § 2251(a), the Eighth Circuit Court of Appeals considered Iowa Code section 728.12(1),[2]

---

[2] Iowa Code section 728.12(1), in relevant part, provides:

> It shall be unlawful to employ, use, persuade, induce, entice, coerce, solicit, knowingly permit, or otherwise cause or attempt to cause a minor to engage in a prohibited sexual act or in the simulation of a prohibited sexual act. A person must know, or have reason to know, or intend that the act or simulated act may be photographed, filmed, or otherwise preserved in a negative, slide, book, magazine, computer, computer disk, or other print or visual medium, or be preserved in an electronic, magnetic, or optical storage system, or in any other type of storage system. A person who commits a violation of this subsection commits a class "C" felony. . . .

that is, a child pornography production statute that is similar to 18 U.S.C. § 2251(a). *Gilmore*, *111* F.3d at 370. The Eighth Circuit Court of Appeals articulated three reasons before concluding that the First Amendment does not mandate a mistake of age defense when a defendant is charged under Iowa Code section 728.12(1) or with sexual exploitation of a minor. *Id,* at 372-73. Those reasons are as follows: (1) there is a strong interest in banning the sexual exploitation of a child whether he or she is truthful or untruthful about his or her age, and a mistake of age defense is directly contrary to such interest; (2) the statute is aimed at producers of child pornography who deal directly with the minor victim and, unlike distributors, producers are in a position to readily and independently confirm the age of the actor or model; and (3) the chilling effect on otherwise protected sexually explicit adult pornography through the reluctance to use young-looking models is qualitatively weak. *Id.* Because those same reasons are equally compelling in the context of 18 U.S.C. § 2251(a), the court concludes that denying the mistake of age defense to child pornography producers does not violate any constitutional right. *Cf. United States v. Deverso,* 518 F.3d at 1257-58 (holding that the Constitution does not mandate a mistake of age defense under 18 U.S.C. § 2251).

In sum, the court concludes that the defendant's knowledge of the girls' ages is not an element that needs to be proved when the government charges conduct under 18 U.S.C. § 2251(a) and there is no

constitutionally mandated mistake of age defense that must be read into 18 U.S.C. § 2251(a). It necessarily follows that the defendant is not entitled to a jury instruction that pertains to a mistake of age defense.

V. DISPOSITION

(1) The defendant's motion for ruling on legal issue and/or ruling on proposed jury instruction (docket no. 26) is **GRANTED IN PART AND DENIED IN PART:**

(a) The court **GRANTS** the motion for ruling to the extent that the defendant asks the court to determine whether a mistake of age defense may be asserted;

(b) The court **DENIES** the remainder of the motion for ruling – knowledge of age is not an element of the offense charged in count 1 and 18 U.S.C. § 2251(a) is not constitutionally infirm in the absence of a mistake of age defense.

(2) The time between the filing of the motion for ruling and the date of the instant order is excluded from consideration under the Speedy Trial Act. *See* 18 U.S.C. § 3161(h)(1)(F).

IT IS SO ORDERED.

DATED this 1st day of May, 2009.

CHIEF JUDGE, U.S. DISTRICT COURT NORTHERN DISTRICT OF IOWA

/s/ Linda R. Reade
LINDA R. READE

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 10-1333

United States of America

Appellee v. Ryan

Dean Heath

Appellant

Appeal from U.S. District Court for the
Northern District of Iowa, Waterloo
(6:09-cr-02003-LRR-1)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

December 22, 2010

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans